

**ORIGINAL**

No. 83-2144

SUPREME COURT OF THE UNITED STATES

October Term, 1983

\*\*\*\*\*

SAMUEL P. GARRISON, et al.,

Petitioners

v.

JAMES LEE HUDSON,

Respondent

\*\*\*\*\*

ON WRIT OF CERTIORARI FROM  
THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

\*\*\*\*\*

BRIEF IN OPPOSITION TO CERTIORARI

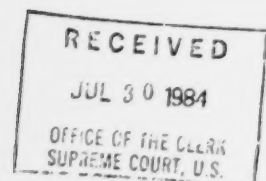
\*\*\*\*\*

J. David James  
700 Southeastern Building  
Greensboro, North Carolina 27401  
(919) 274-2992

Counsel of Record for Respondent

Of Counsel:

Jonathan R. Harkavy  
Nahomi Harkavy  
Smith, Patterson, Follin, Curtis,  
James & Harkavy  
700 Southeastern Building  
Greensboro, North Carolina 27401  
(919) 274-2992



502

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities . . . . .	i
Statement of the Case . . . . .	1
Argument . . . . .	1
Conclusion . . . . .	4
Affidavit . . . . .	5

TABLE OF AUTHORITIES

<u>Berger v. United States</u> , 295 U.S. 78 (1935) . . . . .	2
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 640 (1974) . . . . .	2
<u>Duckworth v. Serrano</u> , 454 U.S. 1 (1981) . . . . .	1, 2
<u>State v. Hudson</u> , 295 N.C. 427, 245 S.E.2d 686, 692 (1978) .	1
<u>United States v. Frady</u> , 456 U.S. 152 (1982) . . . . .	3

\*\*\*\*\*

BRIEF IN OPPOSITION TO CERTIORARI

\*\*\*\*\*

Respondent James Lee Hudson ("Hudson"), by his counsel and pursuant to this Court's Rules 22 and 46, submits this brief in opposition to the petition for certiorari filed by the petitioners, Samuel P. Garrison, Warden, and the Attorney General of the State of North Carolina, Rufus L. Edmisten ("State").

STATEMENT OF THE CASE

The facts which are material to consideration of the questions presented by the petition for certiorari are contained in the Statement of the Case in the petition and in the first three pages of the Fourth Circuit's decision reproduced in Appendix C to the petition for certiorari. Pet. for Cert., App. 20-22.

ARGUMENT

The State suggests three reasons for granting certiorari in this case. As demonstrated below, the Fourth Circuit's unremarkable handling of this habeas corpus case in no way conflicts with applicable decisions of this Court or of other courts of appeals and thus presents no special and important reasons for plenary review. Sup. Ct. Rule 17.1.

1. The State's primary argument that the Fourth Circuit failed to follow Duckworth v. Serrano, 454 U.S. 1 (1981) because Hudson did not exhaust his state remedies on the prosecutorial misconduct issue is plainly wrong as a matter of fact. The North Carolina Supreme Court expressly dealt with Hudson's contention that the district attorney's jury argument was "so improper, inflammatory and prejudicial that it denied defendant a fair and impartial trial." State v. Hudson, 295 N.C. 427, 245 S.E.2d 686, 692 (1978). No matter how the State tries to recast the prose-

cutorial misconduct issue, the fact remains that Hudson exhausted his state remedies with respect to that issue, and there is no possible conflict with Duckworth warranting review by this Court.

2. The State next suggests that the Fourth Circuit's "viewpoint" on prosecutorial vouching with respect to the credibility of witnesses conflicts with the decisions of five other courts of appeals. The suggested "viewpoint" on vouching is beside the point, for the ruling below is not premised simply on vouching. What the Fourth Circuit held to be "unquestionably prejudicial" was "[t]he prosecutor's closing argument to the jury in which he implied that Hudson had a propensity for rape, personally vouched for the integrity of the state's witness, and expressed his belief in Hudson's guilt by saying, 'Thank the good Lord we got the people who did it.'" (Pet. for Cert., App. 23) By resting its due process holding on several "incidents of excessive prosecutorial zeal," (ibid. at App. 22) the Fourth Circuit marked this case as different from cases expressing a viewpoint solely on the unconstitutionality of vouching.

Moreover, even if the Fourth Circuit's approach were more broadly read as a holding that vouching alone denied Hudson a fair trial, that holding is compatible in principle with the approach of the five other courts of appeals cited by the State. None of the cases, including this one, depart from the standards of Donnelly v. DeChristoforo, 416 U.S. 640 (1974) and Berger v. United States, 295 U.S. 78 (1935). Each decision, including the present one, assesses vouching in the total context of the criminal trial. The fact that different results are reached is attributable not to a conflict in legal standards or a departure from this Court's holdings in Donnelly and Berger, but solely to the different context in which the vouching occurred.

Finally, in the present case the district attorney clearly implied that he had unrevealed knowledge of Hudson's guilt when

he remarked to the jury:

"When I have knowledge from my officers and the SBI that a man has committed Murder and Armed Robbery and participated in it by heavens, I'm going to bring him to justice."  
Pet. for Cert., p. 7.

Another portion of the district attorney's closing argument underscored this implication of superior knowledge of guilt:

"It ain't the most beautiful case I ever prosecuted, I'm not going to tell you any lie — it has some holes in it. A five-year-old Murder and Robbery is going to have holes in it, but thank the good Lord we have got the people who did it." Pet. for Cert., p. 6.

Given the clear implication of unrevealed evidence of guilt in the district attorney's vouching remarks and given the fact that this vouching occurred in the context of a trial which hinged solely on the testimony of a State witness for whom the district attorney blatantly vouched, it is clear that the decision below is in conformity with the approach to vouching in the five cases cited by the State.

In no legitimate way, therefore, can there be said to be a conflict between the decision below and the decisions of other courts of appeals which warrants the exercise of this Court's certiorari jurisdiction.

3. Finally, the State expresses simple disagreement with the Fourth Circuit's conclusion that the several incidents of excessive prosecutorial zeal "fatally compromised" the jury's impartiality and thus denied Hudson due process of law. Recognizing that its disagreement with this conclusion is not a substantial ground for a writ of certiorari, the State did not include it in its motion for stay of execution as an issue having a reasonable probability of acceptance for review. Nonetheless, the State now suggests that the Fourth Circuit's decision fails to follow the role differentiation in collateral proceedings noted by this Court in United States v. Frady, 456 U.S. 152 (1982).

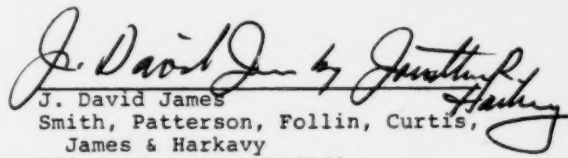
The State's suggestion of a departure from the established standards of collateral review noted in Frady is preposterous

in light of the Fourth Circuit's express recognition that Hudson had the burden of establishing fundamental unfairness, not just ordinary trial error. Pet. for Cert., App. 25. Contrary to the State's assertion that this case involves only errors akin to the admission of irrelevant or misstated evidence, here the jury's impartiality was irreparably subverted by a false implication that Hudson had a propensity for rape, by the district attorney's personal vouching for the integrity of the State's key witness, and by the district attorney's unrestrained expression of personal belief in Hudson's guilt. In light of these facts the Fourth Circuit correctly held that Hudson had carried his burden of establishing fundamental unfairness. The State's argument on this point is simply that it disagrees with the Fourth Circuit's conclusion because it believes the conclusion to be erroneous. As the State conceded, however, in its petition for certiorari, "error alone is not a basis for obtaining certiorari." Pet. for Cert., p. 10. See also Sup. Ct. Rule 17.1.

#### CONCLUSION

For all of the foregoing reasons, and particularly because the State has failed to present any special and important reasons for review as required by Rule 17.1, Hudson prays that the State's petition be denied.

July 26, 1984.

  
J. David James  
Smith, Patterson, Follin, Curtis,  
James & Harkavy  
700 Southeastern Building  
Greensboro, North Carolina 27401  
(919) 274-2992

Of Counsel:

Jonathan R. Harkavy  
Nahomi Harkavy  
Smith, Patterson, Follin, Curtis,  
James & Harkavy  
700 Southeastern Building  
Greensboro, North Carolina 27401  
(919) 274-2992

Counsel of Record for Respondent